

DATE: February 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06028

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 26, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Thomas M. Crean issued an unfavorable security clearance decision, dated December 20, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge erred by finding Applicant falsified material facts about her financial situation when she completed a security clearance application in August 2002; and (2) whether the Administrative Judge erred by finding Applicant has unresolved financial difficulties. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to

a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge erred by finding Applicant falsified material facts about her financial situation when she completed a security clearance application in August 2002. On appeal, Applicant does not dispute that she left off information about her financial situation when she completed a security clearance application in August 2002. However, Applicant asserts that her failure to disclose that information was not intended to deceive or misinform anyone. The Board construes Applicant's appeal brief as raising the issue of whether the Administrative Judge erred by finding she falsified the security clearance application.

The Administrative Judge's decision is contradictory and confusing on the matter of falsification. On the one hand, the Judge seems to have applied Personal Conduct Disqualifying Condition 2 (which is predicated on a finding that a falsification occurred) and Criminal Conduct Disqualifying Condition 2 (which is predicated on a finding that Applicant committed a falsification that falls under 18 U.S.C. §1001). On the other hand, the Judge specifically concluded that Applicant's omission of information about her financial difficulties was *not* a deliberate falsification and that "the disqualifying conditions under Guidelines E and J have not been established."

The Administrative Judge's contradictory and confusing analysis is not sustainable. Without a finding that Applicant committed a falsification, the Judge had no rational basis for applying Personal Conduct Disqualifying Condition 2 or Criminal Conduct Disqualifying Condition 2 in this case. Since the Judge specifically found that "Applicant did not deliberately or knowingly omit, conceal, or falsify relevant and material facts on the security clearance application," there was no rational basis for the Judge to apply Personal Conduct Disqualifying Condition 2 and Criminal Conduct Disqualifying Condition 2 in this case.

However, the Administrative Judge's error is harmless in this case. First, the Judge entered formal findings in favor of

Applicant with respect to SOR paragraphs 2.a and 3.a, which covered the alleged falsification. Second, despite the contradictory and confusing analysis used by the Judge, the Board reads the Judge's decision in its entirety as concluding that Applicant did not falsify her security clearance application. Third, as will be discussed later in this decision, the Judge's unfavorable security clearance decision is sustainable on other grounds.

2. Whether the Administrative Judge erred by finding Applicant has unresolved financial difficulties. The Administrative Judge found that Applicant has unresolved debts totaling approximately \$34,000, and that she failed to present documentary evidence to corroborate her claims that she had paid her debts. On appeal, Applicant asserts "I have since then cleared my credit." The Board construes that statement as raising the issue of whether the Judge erred by finding Applicant has unresolved debts.

Given Applicant's admissions to the SOR allegations under Guideline F and the record evidence that she had unresolved debts, Applicant had the burden of presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive, Additional Procedural Guidance, Item E3.1.15. In weighing the record evidence, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to take into account whether Applicant had presented documentary evidence to corroborate her claim that she had addressed and resolved the debts covered by the SOR allegations. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 5. Considering the record as a whole, Applicant has failed to demonstrate the Judge erred by finding that she has unresolved debts. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Because Applicant has not challenged the Judge's analysis under Guideline F, the Board need not review it.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board